BUSINESS LAW SECTION

THE STATE BAR OF CALIFORNIA

LEGISLATIVE PROPOSAL (BLS-2006-05):
HEALTH LAW: INCAPACITY, ADVANCE HEALTH CARE DIRECTIVES

TO: Larry Doyle, Office of Governmental Affairs

FROM: Jeffrey C. Selman, Vice-Chair, Legislation
Executive Committee, Business Law Section

DATE: October 20, 2005

RE: Proposal to add §4712 to the California Probate Code, relating to Advance Health Care Directives

Section Action:

Approved by BLS Executive Committee: July 27, 2005
Approved by Health Law Committee: June 10, 2005
Vote: Unanimous
Modifications approved by HLC: October 19, 2005

Section Contacts:

Executive Committee Contact:	**Health Law Committee Contact:**
Jeffrey C. Selman Heller Ehrman White & McAuliffe, LLP 275 Middlefield Road Menlo Park, California 94025 Tel: (650) 324-7196 Fax: (650) 324-6625 Email: jselman@hewm.com	David Vukadinovich Co-Chair, Health Law Committee Catholic Healthcare West 251 S. Lake Avenue, 7th Floor Pasadena, California 91101 Tel: (626) 744-2375 Fax: (818) 502-7289 E-mail: david.vukadinovich@chw.edu

I. History, Existing Law, and Purpose

The mission statement of the Health Law Committee (the "Committee") of the Business Law Section provides that it shall "study, review, consider, discuss and develop formal positions on issues involving laws, regulations and governmental action affecting health care issues and . . advocate for such positions." The Committee has concluded that amending the California Probate Code (the "Code") by adding a new Section 4712, as proposed, to include a list of

individuals permitted and authorized by law to make health care decisions for patients who lack capacity to make such decisions for themselves and who do not otherwise have a surrogate decision maker to act on their behalf, would improve the Code and promote certainty and efficiency in the delivery of health care services in the State of California.

History. Division 4.7, commencing with Section 4600 *et seq*., was added to the California Probate Code in 1999. 1999 Stats. c. 658 (A.B. 891), § 39, operative July 1, 2000. Commonly known as the "Health Care Decisions Law," Division 4.7 was modeled on the Uniform Health-Care Decisions Act drafted by the National Conference of Commissioners of Uniform State Laws at its Annual Conference held July 30 through August 6, 1993 (the "Uniform Act").[a] Numerous states have adopted the Uniform Act either its in entirety or in amended form. *See, e.g*., Delaware, 70 Del. Laws, c. 392 (1996); Hawaii, 1999, Act 169; Maine, 1995, c. 378; Mississippi, 1998, c. 542; and New Mexico, 1995, c. 182; Wyoming, 2004-2005, HB 107. The American Bar Association, American Association of Retired Persons (AARP), and the ABA Commission on Legal Problems of the Elderly have all endorsed the Uniform Act.

The preamble materials to the Uniform Act state that its purpose "aims at assisting individuals and the medical profession in better assuring a person's right to choose or reject a particular course of treatment." The Uniform Act achieves that purpose through two primary means. First, the Uniform Act sets forth a model statutory scheme allowing an individual who has capacity to designate a surrogate for purposes of making health care decisions in the event that the individual loses capacity. Second, the Uniform Act sets forth a "priority list" of persons authorized to act as a surrogate decision maker in the event that an incapacitated patient did not select a surrogate prior to be becoming incapacitated.

The California Health Care Decisions Law is substantively consistent with the Uniform Act; however, at the time of adopting the Uniform Act in 1999, the California Legislature ("Legislature") chose not to include the priority list of authorized persons. The Committee has determined that the Legislature made that decision based, at least in part, on the Uniform Act's intentional omission from the priority list of domestic partners. Rather than include domestic partners on the priority list, the Comment to the Uniform Act recommended that "those in non-traditional relationships who want to make certain that health-care decisions are made by their companions should execute powers of attorney for health care designating them as agents." Due to the Uniform Act's intentional omission, the Legislature considered the proposed priority list incomplete and chose not to include it in the California Health Care Decisions Law.

Significantly, in 2001 the Legislature resolved the issue concerning authority of registered domestic partners by adding Probate Code Section 4716. 2001 Stats. c. 893 (A.B. 25), § 49. Section 4716 provides that: "If a patient lacks the capacity to make a health care decision, the patient's registered domestic partner shall have the same authority as a spouse has to make a health care decision for his or her incapacitated spouse." The term "registered domestic partner," as used in the proposed law set forth below, is cross-referenced to Probate Code Section 4716 and entirely consistent with the definition of that term contained in Family Code Section 297

[a] The Uniform Act is available at: http://www.law.upenn.edu/bll/ulc/fnact99/1990s/uhcda93.htm.

(operative Jan. 1, 2005), which addresses registration of domestic partners with the California Secretary of State.

While the Legislature has addressed the authority of registered domestic partners to consent to medical treatment, the Legislature never adopted any provision granting decision making authority to an incapacitated patient's spouse or any other relative in the absence of a spouse or registered domestic partner. Now that the issue regarding registered domestic partners is resolved, Section 4712, as proposed, would essentially add the priority list included in the Uniform Act to the Probate Code (with the addition of registered domestic partners consistent with current law), thus revisiting the decision in 1999 not to adopt that provision of the Uniform Act due to the omission of registered domestic partners.

Existing Law. Consistent with the Uniform Act, the California Health Care Decisions Law allows an individual to execute a power of attorney for health care[b] or individual health care instruction.[c] Powers of attorney for health care and individual health care instructions are collectively referred to as "advance directives."[d] Advance directives can be used by an individual (the "Principal"), while having capacity to make health care decisions, either to: (1) designate an individual to act as the Principal's surrogate decision maker (the "Agent") in the event that the Principal becomes incapacitated and cannot make health care decisions for him or herself; or (2) allow the Principal to express his or her desires concerning health care treatment options so that decisions can be made on the Principal's behalf in the event that the Principal becomes incapacitated.

While the Health Care Decisions Law promotes certainty by allowing California residents to execute an advance directive, current law fails to provide certainty for the large number of individuals who do not execute an advance directive. Rather, with the exception of Section 4716 quoted above, current California statutes provide no guidance to health care providers or patients' families as to who may make health care decisions on behalf of an incapacitated patient who lacks an advance directive that names an Agent.

Purpose. The purpose of the proposed addition of Section 4712 is to authorize an incapacitated patient's spouse or registered domestic partner, designated family member, or other relative, in the order provided, to act on behalf of the patient and consent to medically necessary services. The Committee has debated the merits of each aspect of Section 4712 as proposed and, while the Committee has borrowed significantly from the text of the Uniform Act in drafting the proposed law, it has been careful to draft a law that it believes improves upon the Uniform Act and fits within California's statutory framework. The substance of the proposed law, including the order of authority, is consistent with similar laws enacted by other states. *See, e.g.*, Ariz. Rev. Stats. § 36-3231; Ill. Rev. Stats. ch. 40, § 75; Tex. Health and Safety Code Ann. § 313.004.

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[b] A "power of attorney for health care" is "a written instrument designating an agent to make health care decisions for the principal." Cal. Prob. Code § 4629.

[c] An "individual health care instruction" is "a patient's written or oral direction concerning a health care decision for the patient." *Id*. § 4623.

[d] *Id*. § 4605.

The proposed statutory addition would apply only to incapacitated patients who do not have an advance directive, a court ordered conservatorship, or guardianship that names an available Agent. Providing a statutorily authorized priority list of surrogate decision makers would provide certainty both to patients and their families and to the healthcare providers, including hospitals and physicians, charged with providing care.

Reasons for the Proposal. The failure of California law to provide a priority list of authorized surrogate decision makers impedes the delivery of health care services by creating ambiguity as to who may lawfully consent to services on behalf of an incapacitated patient who has not designated an Agent. For example, unlike the law in many other states, California law does not expressly authorize an incapacitated patient's spouse to make health care decisions on behalf of the patient absent an advance directive to that effect. Under current law, a health care provider may seek judicial appointment of a conservator for such a patient pursuant to Probate Code Section 3200 *et seq*. but that option is impractical due to expense, the reluctance of many courts to intervene, and the time sensitive nature of these situations. In many instances, a patient cannot forgo care for the days or weeks that it often takes for a conservator to be appointed.

While the proposed law would establish an order of authority among listed decision makers, that priority list would not trump the wishes of the patient. The priority list would be used only to identify a decision maker if the patient has not designated an Agent. The priority list would never come into play for a patient who has designated an available Agent. Additionally, an individual with capacity would always be free to designate an Agent other than as provided by the proposed law. In other words, using the first example cited in the paragraph above, a married individual would be free under the proposed law, as under current law, to execute an advance directive that names an Agent other than the individual's spouse, if that is his or her desire.

It is also important to bear in mind that the proposed law would provide only for designation of a decision maker; it would not attempt to dictate how decisions should be made. Rather, the Agent, whether designated by the patient in an advance directive or selected according to the proposed hierarchy, must, as required by existing law, make decisions consistent with the previously expressed wishes of the patient, if known, or consistent with the patient's best interest. Additionally, existing law does not preclude an individual from challenging the decision of an authorized surrogate if the surrogate is acting inconsistently with the previously expressed wishes of the patient or the patient's best interest, and the creation of a priority list for patients who have not previously designated an Agent in an advance directive would not change the ability to so challenge a decision of an authorized surrogate. All remedies currently available at law would continue to be available under the proposed law in the event that family members have a legitimate dispute as to an incapacitated patient's treatment. Those remedies include court intervention to appoint a conservator pursuant to Probate Code Section 3200 *et seq*. In such instances the court would not be bound to follow the proposed order of authority. The proposed law would neither expand nor narrow available treatment options.

Any discussion of end of life care brings to mind the recent media coverage and litigation involving Theresa Schiavo ("Schiavo"); however, those events do not undercut the need for the proposed law. The Schiavo case involved a young woman who became severely brain damaged

as a result of a cardiac arrest in 1990. Schiavo then remained in a permanent vegetative state for many years. *See In re Guardianship of Schiavo*, 780 So.2d 176, 177 (Fla. App. 2 Dist., 2001). Schiavo had limited to no ability to communicate or care for herself. *See id*. Schiavo's husband, Michael, was appointed as her guardian pursuant to Florida law. Michael, after evaluating Schiavo's medical condition and, presumably after considering her previously expressed wishes concerning end-of-life treatment, sought to withdraw artificial nutrition and hydration and allow Schiavo to die. After learning of Michael's proposed decision, Schiavo's parents sought court intervention to prevent the withdrawal of care. *See id*. at 177-178. In affirming the decision of the lower court, the District Court of Appeal of Florida found that Michael Schiavo had demonstrated by clear and convincing evidence that Schiavo had previously expressed a desire that she would not want to be maintained in a permanent vegetative state and ordered removal of artificial nutrition and hydration.[e] Thus, at its core, the Schiavo case involved a dispute between Schiavo's husband (and guardian) and her parents over the previously expressed wishes and best interest of a nonterminal patient in a permanent vegetative state.

As stated above, current California law does not preclude an individual from challenging the decisions of an authorized Agent if the Agent is alleged to be acting inconsistently with the previously expressed wishes of the patient or the patient's best interest. The Committee does not propose to modify that aspect of the law and Section 4712, as proposed, would have no impact on that process. In other words, an individual would be free to challenge the decisions of an Agent, whether designated by the patient or authorized under Section 4712, if the Agent's decisions are alleged to be inconsistent with the patient's previously expressed wishes or best interest. Addition of Section 4712 would not affect the right of a party to seek judicial intervention nor would it make judicial intervention any more or less likely to occur. Additionally, a court's decision to order or withdraw medical treatment would continue to be guided by the patient's previously expressed wishes and best interest, without regard to Section 4712.

III. Pending Litigation

To our knowledge, no litigation is pending on this issue.

IV. Likely Support and Opposition

We anticipate that the proposed addition of Section 4712 would receive the strong support of the hospital and physician communities, as well as patient's rights groups. The Committee does not currently expect any opposition, although any groups that opposed adoption of the Health Care Decisions law might also oppose the proposed law.

V. Fiscal Impact

[e] The Schiavo litigation was followed by various highly publicized interventions by the Florida Governor and Legislature. Such interventions are highly unusual and the collective experience of the Committee members indicates that family members generally do not disagree as to appropriate treatment and courts only rarely become involved.

None expected.

VI. Germaneness

The subject matter of the proposed Section 4712 is one in which the members of the Business Law Section (and, in particular, the members of the Health Law Committee) have special experience and expertise since the Committee members represent and advise public and private hospitals and health systems, physicians, and patients concerning medical consent issues. The subject matter of the proposed Section 4712 requires the special knowledge, training, experience, and technical expertise of the Business Law Section, Health Law Committee. The Committee has considered the interests of all affected parties in drafting the proposed Section 4712 and the Committee has determined that addition of the proposed Section 4712 would promote clarity, consistency, and comprehensiveness of the law.

VII. Text of proposal

SECTION 1. Section 4712 is added to the Probate Code, to read:

(a) If an adult patient lacks capacity to make health care treatment decisions, a health care provider shall make a reasonable effort to locate and shall follow an advance health care directive. In the event that an adult patient who lacks capacity does not have an advance health care directive that designates a reasonably available agent, the patient does not have a court appointed guardian or conservator who has authority to make health care decisions, and the patient lacks capacity to designate a surrogate, then a health care provider shall make reasonable efforts to contact the following individual or individuals in the indicated order of priority and authority to act as the patient's surrogate, as defined in Section 4643:

(1) The patient's spouse, or the patient's registered domestic partner as set forth in Section 4716, unless (A) a decree of marital dissolution or legal separation has been entered between the patient and spouse, or (B) a proceeding for marital dissolution or legal separation between the patient and spouse has been filed and not dismissed, or (C) a Notice of Termination of Domestic Partnership has been filed with the Secretary of State.

(2) An adult child of the patient.

(3) A parent of the patient.

(4) An adult brother or sister of the patient.

(5) A grandparent of the patient.

(6) An adult grandchild of the patient.

(7) An adult relative of the patient. For the purposes of this paragraph, "an adult relative" means an adult, other than a person designated above, who is related to the patient and who has exhibited special care and concern for the patient, who is familiar with the patient's health care views and desires and is willing and able to become involved in the patient's health care and to act in accordance with the patient's previously expressed wishes or, if none are known, the patient's best interest.

(b) If more than one member of a single class set forth in subsections (a)(2) through (a)(7) above assumes authority to act as surrogate and the supervising health care provider is informed that the members of such class do not agree on a health care decision, the supervising health care provider shall comply with the decision of a majority of the members of that class who have communicated their views to the provider. If the class is evenly divided concerning a

health care decision and cannot come to agreement on the treatment decision, that class and all individuals having lower priority shall be disqualified from making that health care decision for the patient.

(c) A surrogate shall communicate his or her assumption of authority as promptly as practicable to available members of the patient's family and to the health care provider.

(d) A health care provider may rely on a decision made by a surrogate for a patient pursuant to this section without obtaining judicial approval.

Membership in the BUSINESS LAW SECTION is voluntary and funding for Section activities, including all legislative activities, is obtained entirely from voluntary sources.